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No. 89-1175

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NUCLEAR TRANSPORT AND STORAGE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner is not entitled to injunctive or declaratory relief to prevent an alleged taking of property because compensation for the taking would be available in the Claims Court under the Tucker Act, 28 U.S.C. 1491.

2. Whether petitioner, the licensed operator of a uranium storage facility, failed to state a claim under the Due Process Clause or the Atomic Energy Act with regard to the Department of Energy's alleged policy of providing free uranium storage to customers that utilize the Department's services in the enrichment of uranium.

3. Whether the district court correctly dismissed petitioner's claims against present and former officials of the Department of Energy under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 890 F.2d 1348. The opinion of the district court (Pet. App. A17-A43) is reported at 703 F. Supp. 660.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1989, and the petition for a writ of certiorari was filed on January 16, 1990 (the day following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The commercial production of nuclear energy in the United States is governed by the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* In 1964, Congress amended the Act to encourage development of the domestic nuclear power industry.[1] The 1964 legislation authorized private utilities, for the first time, to own the uranium used as fuel in their nuclear reactors. The 1964 legislation also authorized the predecessor agency of the Department of Energy (DOE) for these purposes—the Atomic Energy Commission (now the Nuclear Regulatory Commission)—to enter into contracts under which it would "enrich" the natural uranium owned by private utilities. Before it can be used as fuel in nuclear plants, uranium must be enriched through a process that increases the proportion of the fissionable isotope U-235 from approximately 1% to 3%. At the time of the 1964 legislation, the Commission operated the only enrichment facilities in the world. See generally *Huffman* v. *Western Nuclear, Inc.*, 486 U.S. 663, 665 & n.2 (1988).

The enrichment-contract authority added to the Atomic Energy Act in 1964 is contained in Section 161(v) of the Act, 42 U.S.C. 2201(v). That Section requires the Commission, now DOE, to establish written criteria setting forth the terms and conditions under which enrichment services will be made available. It further provides that "any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time." Pursuant to 42 U.S.C. 2201(v), DOE has published regulations governing enrichment contracts.

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[1] Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602.

10 C.F.R. Pt. 762. The regulations authorize DOE to negotiate prices for enrichment services on a contract-by-contract basis. 10 C.F.R. 762.4.

2. Petitioner operates a facility for storage of unenriched uranium hexaflouride until it is ready to be enriched. Because uranium hexaflouride is a "source material," 42 U.S.C. 2014(z), its storage requires a license from the Commission. 42 U.S.C. 2092. The Commission may enter into an agreement with a State for the latter to regulate and issue licenses for the possession of source material if the State has a program for the control of radiation hazards that is adequate to protect the public health and safety. 42 U.S.C. 2021(b) and (d). The Commission has entered into such an agreement with the Commonwealth of Kentucky, and petitioner obtained a license from the Kentucky Cabinet for Human Resources for the operation of its facility. Pet. App. A1-A2 & n.1.

Petitioner filed this suit on April 26, 1988, alleging that the United States and several of its officials violated the Atomic Energy Act and the Constitution by providing free storage of unenriched uranium in connection with DOE's provision of enrichment services. In addition to the United States, the defendants named in the complaint were John S. Herrington, former Secretary of Energy, Phillip G. Sewell, Deputy Assistant Secretary for Uranium Enrichment, and Joe B. LaGrone, the Manager of the Oak Ridge enrichment facility. These defendants were sued in both their official and individual capacities.

The complaint alleged that petitioner had been encouraged to enter the business of storing uranium hexaflouride by unnamed government officials who told petitioner that DOE did not intend to provide

storage services. The complaint further alleged that DOE changed that policy by negotiating feed usage agreements with some of its enrichment customers. Pet. App. A2-A3, A65. The court of appeals described such an agreement as follows (*id.* at A3):

> Under a feed usage agreement, DOE takes title to the nuclear feed material which a customer wishes to deliver to DOE in advance of the date calculated for enrichment and DOE determines that it is to DOE's advantage to accept early delivery. DOE maintains that among the advantages that may arise from early delivery are obtaining a steady supply of unenriched uranium to keep the plants in operation, flexibility in operating the enrichment plants, and increasing the nation's stockpile of enriched uranium. Because of the exigencies of scheduling, the unenriched uranium received by DOE is in many cases not the same enriched uranium ultimately delivered to the customer and, thus, DOE argues, no actual "storage" of a customer's uranium occurs at all.

In petitioner's view, however, the feed usage agreements had the purpose and effect of offering free storage to DOE's enrichment customers, and thereby caused a substantial decline in petitioner's storage business. Pet. App. A3, A67. Petitioner alleged that the agreements violated the Atomic Energy Act (*id.* at A3, A67-A69) and that by failing to furnish petitioner notice and an opportunity to be heard before adopting their alleged policy of offering free storage, the defendants had unconstitutionally "interfered with and deprived [petitioner] of the benefits of its valuable property and unlawfully and wrongfully expropriated [petitioner's] property." *Id.* at A69-A70.

Petitioner sought declaratory and injunctive relief and damages in excess of $5 million. *Id.* at A70-A71.[2]

3. The district court granted summary judgment in favor of the defendants (Pet. App. A17-A43), and the court of appeals affirmed. *Id.* at A1-A16.

a. The court of appeals first held that the district court lacked jurisdiction over petitioner's *Bivens* claims[3] against the United States and the individual defendants in their official capacities for money damages based on the commission of a constitutional tort. Pet. App. A7-A8. The court observed: " 'It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction' " (*id.* at A6, quoting *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983)), and it found no waiver of sovereign immunity from such claims in the Atomic Energy Act or any other statute. Pet. App. A8.

b. The court also rejected petitioner's claim for injunctive and declaratory relief for an alleged constitutional violation. Insofar as petitioner alleged that DOE's actions resulted in an uncompensated taking of a property interest, the court held that injunctive and declaratory relief to prevent such a taking was unavailable because petitioner could seek

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[2] The district court understood petitioner to have changed its theory during the course of briefing and argument in that court, abandoning its statutory claims and proceeding exclusively on its constitutional claims. See Pet. App. A24. See also *id.* at A10 n.5. Nevertheless, both the district court and court of appeals extensively considered and rejected petitioner's arguments that DOE violated the Atomic Energy Act and implementing regulations. See *id.* at A10-A14, A36-A41.

[3] See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

compensation in the Claims Court under the Tucker Act, 28 U.S.C. 1491. Pet. App. A9-A10.

Insofar as petitioner alleged a constitutional tort, not a taking, in DOE's failure to accord it due process, the court was of the view that the claim was premised on violations of the Atomic Energy Act and that petitioner "is thus in actuality asserting a statutory claim in constitutional guise." Pet. App. A9-A10. Turning, then, to petitioner's statutory arguments, the court held that petitioner failed to state a claim under the Atomic Energy Act. *Id.* at A9-A14. For example, petitioner relied on the requirement in 42 U.S.C. 2201(m) that prices charged by DOE for enrichment or other services shall be established on such a non-discriminatory basis as, "in the opinion of the [DOE], will provide reasonable compensation to the Government for such * * * services and will not discourage the development of sources of supply independent of the [DOE]." The court found that reliance misplaced: "§ 2201 (m) does not apply to [petitioner] since that section deals only with the impact of DOE charges on sources of supply and [petitioner] is not a supplier of unenriched uranium." Pet. App. A11.

The court also found no violation of 42 U.S.C. 2201(v), which requires DOE to establish prices "on a basis of recovery of the Government's costs over a reasonable period of time." The court explained that this general standard "does not require DOE to charge on an itemized basis for every cost incurred" and that "[t]he legislative history of the Act indicates that cost recovery is to be flexible." Pet. App. A12 (citing S. Rep. No. 1325, 88th Cong., 2d Sess. 18 (1964)). The court likewise found no violation of the criteria promulgated by DOE to implement Section 2201(v), because the criteria also are flexible

and permit DOE to negotiate prices on a case-by-case basis. Pet. App. A12 (citing 10 C.F.R. 762.4, 762.7). The court found it significant as well that the implementing criteria expressly authorize additional terms and conditions in particular contracts, as long as they are not inconsistent with the published criteria (see 10 C.F.R. 762.14); this condition, the court concluded, was respected here because "provision of storage services is not inconsistent with any other criteria." Pet. App. A12-A13.

In a related vein, the court rejected petitioner's contention that the feed usage agreements deprived it of a property interest in its license without due process of law because petitioner was not given notice and an opportunity for a hearing before DOE entered into such agreements. Pet. App. A13-A14. After examining each of the statutory and regulatory provisions upon which petitioner relied, the court concluded that petitioner's license "provided it at most with a 'mere unilateral expectation' that the government would not provide storage space," an expectation that "is not a property interest entitled to protection." *Id* at A13. And aside from the license itself, the court found "nothing in the statute, regulations, or DOE policy [that] provides [petitioner] with a constitutionally protected right to provide storage services under its license free of government competition or entitles [petitioner] to a predetermination hearing when there is a change of policy." *Id.* at A14.

c. Finally, the court held that petitioner's damage claims against the present and former DOE officials in their individual capacities were properly dismissed for lack of specificity in connecting any individual defendant and the allegedly unlawful actions of DOE. Pet. App. A14-A16.

ARGUMENT

The court of appeals correctly affirmed the district court's dismissal of petitioner's claims against the United States and the individual defendants. Although petitioner infuses its submission with constitutional references, its claims reduce to the contention that DOE's feed usage agreements are inconsistent with the Atomic Energy Act. The court of appeals properly rejected that contention, and its disposition does not conflict with any decision of this Court or another court of appeals. In fact, petitioner's statutory claims raise questions of first impression that arise here in unusual circumstances and that therefore present no issue of general or continuing importance warranting review by this Court.

1. Petitioner first asserts (Pet. 8-13) that the court of appeals refused to review its claims for declaratory and injunctive relief on the ground that petitioner could seek money damages for an unconstitutional taking in the Claims Court under the Tucker Act, 28 U.S.C. 1491. Contrary to petitioner's assertion, however, the court of appeals and the district court exhaustively analyzed petitioner's arguments concerning alleged violations of due process and the Atomic Energy Act and found them to be without merit. Pet. App. A10-A14, A36-A41.

The Tucker Act ruling to which petitioner objects merely reflects the well established principle, recently reaffirmed in *Preseault* v. *ICC*, No. 88-1076 (Feb. 21, 1990), that a party may not seek to enjoin an alleged taking when compensation for any taking may be recovered in the Claims Court. See Pet. App. A9-A10. Accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-690 (1981); *Duke Power Co.* v. *Caro-*

lina Environmental Study Group, Inc., 438 U.S. 59, 94 n.39 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-136 (1974). Because petitioner has not shown that the Tucker Act remedy has been withdrawn in these circumstances, the court of appeals correctly held that petitioner is not entitled to injunctive and declaratory relief based on the allegation in its complaint that DOE "wrongfully expropriated [petitioner's] property." Pet. App. A10.[4]

2. The court below properly rejected petitioner's statutory claims for injunctive and declaratory relief, as well as petitioner's constitutional claims (to the extent petitioner presses them) that are premised on the same underlying statutory provisions.

a. As an initial matter, although petitioner recites in the "Statement of the Case" portion of the certiorari petition its contention below that the alleged actions of DOE had the effect of depriving petitioner of property (the value of its license and business) without due process (see Pet. 4-5), petitioner does

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[4] Petitioner expressly does not rely, as a reason for granting review, on a challenge to the court of appeals' holding that petitioner cannot recover money damages against the United States (or the individual defendants in their official capacities) under a *Bivens* theory—although it does reserve the right to argue, if certiorari is granted, that the United States may be "joined" with individual defendants in a *Bivens* action. See Pet. vi. The court of appeals, however, correctly held that damages cannot be recovered against the United States under a *Bivens* theory. As this Court recently reaffirmed, " 'the United States, as sovereign, "is immune from suit, save as it consents to be sued" ' " (*United States* v. *Dalm*, No. 88-1951 (Mar. 20, 1990), slip op. 11. Petitioner has pointed to no statutory waiver of sovereign immunity that authorizes a damages action against the United States in circumstances such as these.

not challenge the court of appeals' holding that petitioner had at most a "mere unilateral expectation" that the United States would not provide storage space, an expectation that "is not a property interest entitled to protection." Pet. App. A13. In particular, neither the questions presented (Pet. i-vi) nor the "Reasons for Granting the Writ" portion of the petition (Pet. 8-23) challenges the court of appeals' holding that "nothing in the statute, regulations, or DOE policy provides [petitioner] with a constitutionally protected right to provide storage services under its license free of government competition or entitles [petitioner] to a predetermination hearing when there is a change of policy." Pet. App. A14. Thus, as the court of appeals further explained, petitioner "has alleged no more than an indirect injury resulting from government action[,] which does not create entitlement to a hearing." *Id.* at A13 (citing *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 789 (1980)).[5]

b. The argument petitioner does make in its petition—that DOE's actions violated substantive requirements of the Atomic Energy Act—is without merit.

As the court of appeals recognized, the first provision upon which petitioner relies (Pet. 14-16), 42

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[5] Any such property interest giving rise to procedural due process protections presumably would have to be based on the licensing provisions of the Act (42 U.S.C. 2092)—not on 42 U.S.C. 2201(m), 2201(v), upon which petitioner relies (Pet. 14-19)—and yet petitioner does not discuss the licensing provisions in its petition. Furthermore, a licensing regime intended to protect public health and safety should not lightly be construed to confer *property* rights that would bar the government from revising its regulatory or contracting policies. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986).

U.S.C. 2201(m), is inapplicable here. Pet. App. A11. Section 2201(m) authorizes DOE to provide processing, fabricating, separating, and refining services to certain licensees and to make certain forms of uranium available to them.[6] Section 2201(m) further directs DOE to establish prices for those goods and services on a non-discriminatory basis and at a level that, "in the opinion of the [DOE], will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the [DOE]." The storage of uranium, in which petitioner is engaged, is not among the services covered by Section 2201(m). Moreover, as the court of appeals concluded, the language in Section 2201(m) upon which petitioner relies "deals only with the impact of DOE charges on sources of supply." Pet. App. A11. Because petitioner is not a "source of supply," the court below properly held that petitioner may not invoke that Section to challenge DOE's feed usage agreements.[7] Finally, Section 2201(m) re-

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[6] Under 42 U.S.C. 2201(m), DOE may enter into contracts with persons licensed to take certain actions pursuant to an agreement with a foreign country, 42 U.S.C. 2133; persons licensed to use nuclear materials in medical research and related activities, 42 U.S.C. 2134; persons licensed to distribute nuclear materials obtained through an agreement with a foreign country, 42 U.S.C. 2073(a); and persons who distribute source material for certain enumerated purposes, 42 U.S.C. 2093(a).

[7] Nothing in the legislative history cited by petitioner (Pet. 15) suggests a broader reach for the proviso. To the contrary, the testimony of the Atomic Energy Commission representative reiterates the statutory standard that the prices should "not discourage development of independent sources of supply." See *To Amend the Atomic Energy Act of 1954: Hearings on S. 3323 and H.R. 8862 Before the Joint Comm. on Atomic Energy*, 83d Cong., 2d Sess. Pt. 2, at 601-602 (1954). The

quires only that prices be those that, "in the opinion of [DOE]," will satisfy the statutory criteria. "This standard fairly exudes deference" to DOE (*Webster* v. *Doe*, 486 U.S. 592, 600 (1988)), and the prices set by DOE therefore would be subject to only the narrowest scope of judicial review at the behest of a party such as petitioner, if indeed they would be subject to such review at all.

The court also properly rejected petitioner's argument (Pet. 17-19) that the incidental effect of a feed usage agreement in furnishing "storage" of unenriched uranium violates 42 U.S.C. 2201(v). That Section authorizes DOE to enter into contracts for uranium enrichment and directs it to establish written criteria setting the terms and conditions under which services shall be made available. It also states that "any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time." As with 42 U.S.C. 2201(m), just discussed, we have substantial doubts that petitioner's interests are among those protected by the quoted proviso to Section 2201(v), since this Section on its face seems designed to protect only the government's revenue interests. In any event, as the court observed, Section 2201(v) "does not require DOE to charge on an itemized basis for every cost incurred." Pet. App. A12. All it requires is that the overall prices charged be on a basis of recovery of

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statement in the Senate Report that the Commission may enter into agreements with licensees to furnish services and materials where they "are not otherwise commercially available" (S. Rep. No. 1699, 83d Cong., 2d Sess. 26 (1954)) is descriptive of the Commission's general authority and does not specifically address the language of the proviso that petitioner cites.

the government's total costs over a reasonable period of time. Petitioner did not allege in its complaint that the prices charged by DOE to its enrichment customers generally will not lead to recovery of the government's costs in furnishing enrichment services to them. Nor did petitioner even allege that the overall price charged to any particular customer (such as a party to a feed usage agreement) will not lead to recovery of the overall cost of furnishing the package of services to that customer.[8]

Like Section 2201(v) itself, DOE's implementing criteria are also flexible. They provide that charges will be established "on a basis that recovers *appropriate* Government costs over a *reasonable* period of time" and list five general categories that may be the subject of charges. 10 C.F.R. 762.5 (emphasis added). The regulations further provide that DOE may negotiate prices on a case-by-case basis "in accordance with an overall approach intended to maintain the long-term competitive position of DOE while

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[8] As the court of appeals pointed out (Pet. App. A12), the legislative history of the 1964 amendments confirms that the standards for compensation were intended to be "flexible." S. Rep. No. 1325, *supra*, at 18. Petitioner correctly states (Pet. 18-19) that the proviso originally enacted in 1964 had somewhat different language (see 42 U.S.C. 2201(v) (1964)) and that the proviso was amended in 1970 to read as it now does (see Act of Dec. 19, 1970, Pub. L. No. 91-560, § 8, 84 Stat. 1474) to assure that the government does not recover less than the costs it incurred, averaged over a reasonable period of time. See S. Rep. No. 1247, 91st Cong., 2d Sess. 20-25 (1970). But nothing in those amendments or their legislative history supports petitioner's notion that when DOE enters into a feed usage agreement, the agency must break down a single overall price for enrichment services into separate components and allocate a specified portion to "storage."

obtaining the recovery of the Government's costs over a reasonable period of time" (10 C.F.R. 762.4), and that DOE shall set prices on the basis of its "judgment of cost differentials associated with supplying enrichment services to different customers" (10 C.F.R. 762.7).

These statutory and regulatory standards, which are written in general terms and take into account long-term projections and non-price factors, do not require DOE to allocate any particular portion of its overall price for enrichment services to "storage." Nor do they confer a right on petitioner to have the government refrain from competing in an area that arguably involves "storage" of unenriched uranium—even assuming, arguendo, that the feed usage agreements are properly characterized as furnishing "storage" during the period between DOE's receipt of a particular batch of uranium in an unenriched state and DOE's subsequent delivery of that batch in an enriched state.

3. The court of appeals also correctly dismissed petitioner's *Bivens* claims against the former Secretary of Energy and two other DOE officials in their individual capacities on the ground that petitioner failed to allege a sufficient factual nexus between those defendants and the events constituting the asserted deprivation of property without due process. This holding is supported by the record and fully effectuates the policies articulated in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and its progeny. See also *Brown* v. *Texas A & M University*, 804 F.2d 327, 333 (5th Cir. 1986) ("plaintiff must plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery, including those necessary to negative the defense of qualified immunity"); *Martin* v. *Malhoyt*,

830 F.2d 237, 257 (D.C. Cir. 1987) ("conclusory allegations of unconstitutional or otherwise illegal conduct will not withstand a public official's dispositive pretrial motion").

Moreover, in challenging the dismissal of its *Bivens* claims, petitioner relies in this Court, as it did in its complaint (Pet. App. A69-A70), exclusively on allegations that the defendants violated several provisions of the Atomic Energy Act and implementing regulatory criteria. See Pet. 21-22. But the mere violation of statutory and regulatory provisions, even if proven, does not amount to a violation of due process. See *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948). Nor is there any implied right of action under the Atomic Energy Act itself to recover money damages against individual government officials for violations of that Act, and petitioner did not in any event rely on such an implied right of action in its complaint. See Pet. App. A69-A70.

Even if plaintiff had alleged a sufficient connection between the individual defendants and the actions at issue here and had sufficiently shown how those actions violated the Due Process Clause (not merely the Atomic Energy Act), dismissal of petitioner's *Bivens* claims would be required. In light of the court of appeals' holding that petitioner failed to state a violation of its constitutional rights, petitioner could not seriously argue that the individual defendants interfered with a "clearly established" constitutional right, a showing necessary to overcome the individual defendants' entitlement to qualified immunity from suit. See generally *Harlow* v. *Fitzgerald*, 457 U.S. at 818.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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